(7)

No. 89-1715

In the Supreme Court of the United States

OCTOBER TERM, 1990

CATHY BURNS, PETITIONER

v.

RICK REED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

BARBARA L. HERWIG
JEFFREY A. CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity from suit for damages under 42 U.S.C. 1983 for giving legal advice to police officers about the conduct of their investigation and for later eliciting testimony during a probable cause hearing to obtain a search warrant.

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INTEREST OF THE UNITED STATES

This case presents a question this Court reserved in *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.33 (1976): whether a prosecutor has absolute immunity from suit for damages under 42 U.S.C. 1983 for giving legal advice to police officers about the conduct of their investigation and for later eliciting testimony during a probable cause hearing to obtain a search warrant. Although federal officers are not subject to suit under Section 1983 for constitutional violations, there is an implied right of action against them for violations of constitutional rights, see, *e.g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and this Court has stated that the scope of immunity available to federal officers in such an action is generally the same as that available to state officials sued under Section 1983. See *Harlow* v.

Fitzgerald, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). The United States thus has a direct and substantial interest in the Court's resolution of the question presented. The disposition of this case is likely to have a significant effect on the liability of federal prosecutors sued for damages as a result of actions taken in the performance of their official duties.

STATEMENT

1. On September 2, 1982, petitioner reported that an individual had entered her home in Muncie, Indiana, knocked her unconscious, and then shot and wounded her two children. During their investigation, Muncie police officers Paul Cox and Donald Scroggins determined that petitioner herself was "their prime suspect" in connection with the incident, Pet. App. 2a, even though she had no difficulties with polygraph and voice stress examinations, provided exculpatory handwriting exemplars, and held to her story during repeated interviews. Cox and Scroggins apparently believed that petitioner was a "multiple personality." *Ibid.*

Cox and Scroggins decided to interview petitioner under hypnosis. On September 21, 1982, Scroggins telephoned respondent Rick Reed, the Chief Deputy Prosecutor for Delaware County, at his home and asked him about the propriety of such an interview.[1] After hearing that petitioner was the officers' principal suspect and that she alone could provide "additional information" about the crime, respondent told Scroggins that he should proceed with the interview as planned. Pet. App. 2a-3a.

Cox and Scroggins then obtained petitioner's consent and hypnotized her at the police station. During the interview, petitioner described the intruder and identified her as "Katie." She also referred to herself as

[1] Respondent was the "police liaison attorney" between the police department and the county prosecutor's office. Pet. App. 2a. Respondent had no prior involvement in the officers' investigation. Tr. 65, 111.

"Katie," and the officers interpreted that reference as supporting their theory that petitioner had committed the crime and that she suffered from a personality disorder.[2] Once taken out of hypnosis, petitioner again told the officers that she had had nothing to do with the crime. Pet. App. 3a.

Cox and Scroggins decided to keep petitioner in custody and sought respondent's advice about whether there was probable cause to arrest her. Respondent met the officers at the police station on the night of September 21. Officer Cox "explain[ed] to him what [the officers] had developed as a result of the hypnotic session and ask[ed] if he felt like we had probable cause to * * * arrest [petitioner]." Tr. 107. Respondent told the officers that they "probably had probable cause for the arrest." Tr. 108. As a result, the officers placed petitioner under arrest.[3]

The following day, September 22, respondent, accompanied by Officer Scroggins, appeared before a county court judge to obtain a warrant to search petitioner's home.[4] Under respondent's questioning, Scroggins testified at the probable cause hearing that petitioner, during the September 21 interview, had confessed to shooting her children. Neither Scroggins nor respondent explained the peculiar circumstances of the interview, *i.e.*, that peti-

[2] The officers recorded the interview on videotape. According to petitioner, that tape shows that Officer Cox gave petitioner a "post-hypnotic suggestion * * * that [she] would not remember the hypnosis but would cooperate fully with the police in their investigation." Pet. 3; see Pet. Br. 4. Moreover, according to the district court, the officers had "conned [petitioner] into submitting to hypnosis, and then suggested a number of things to her when she gave answers that they didn't like." Pet. App. 16a.

[3] Petitioner was later taken to a state hospital, where she spent four months in a psychiatric ward. During that stay, medical and psychological experts concluded that petitioner did not suffer from a personality disorder. Pet. App. 4a.

[4] Respondent had been instructed to assist the police in procuring the search warrant. Tr. 134-135.

tioner had been hypnotized. As a result of Scroggins' testimony, the judge issued the search warrant. Pet. App. 3a, 19a-22a.

On September 28, the county court judge issued a formal warrant for petitioner's arrest on charges of attempted murder. The court issued that warrant based on the affidavit of Jack Stonebraker, an investigator for the Delaware County Prosecuting Attorney. That affidavit recounted petitioner's alleged confession, but, like Scroggins' earlier testimony, did not mention the circumstances of the interview. Pet. 3a-4a.

Petitioner was charged under Indiana law with attempting to murder her two children and was ordered to stand trial.[5] Before trial, petitioner filed a motion to suppress the statements given under hypnosis. The state trial court granted that motion. Since those statements apparently were the linchpin of the State's case, the Delaware County Prosecuting Attorney's Office dismissed all criminal charges against petitioner. Pet. App. 4a.

2. In January 1985, petitioner filed a federal court action against respondent, Scroggins, Cox, Stonebraker, the Muncie Police Department, and other Muncie police officials. With respect to respondent, petitioner claimed that his approving the police officers' request to interview her under hypnosis, participating in her arrest, and later eliciting misleading testimony about that interview during the probable cause hearing violated her constitutional

[5] As a result of petitioner's confinement to the psychiatric ward, state authorities sought and obtained temporary custody of her two children. After the criminal charges were dismissed, petitioner's older child was returned to petitioner's custody in 1986; as a result of his father's demands, the younger child evidently has not been allowed to live with petitioner. See Pet. 4; Pet. Br. 5-6.

Petitioner also lost her job as a radio dispatcher for the Muncie Police Department as a result of this episode. She was unable to regain that position after the criminal charges were dismissed. Pet. 4-5; Pet. Br. 6.

rights. Compl. ¶ 47; see *id.* ¶¶ 1, 32.[6] Petitioner sought compensatory and punitive damages. *Id.* ¶ 47.

Before trial, respondent filed a motion for summary judgment, contending that he was entitled to absolute immunity from liability in damages for his conduct as a prosecutor.[7] The court denied that motion, finding that, on the record presented to date, it was not clear whether respondent's alleged conduct fell within the scope of his prosecutorial duties. The court thus concluded that there were genuine issues of material fact that warranted proceeding to trial. Pet. App. 5a.[8]

After presentation of petitioner's case, the district court granted respondent's motion for a directed verdict, holding that Reed was absolutely immune from suit for "giving legal advice and presenting a matter in court." Pet. App. 17a. The court found that respondent's ap-

[6] Petitioner also claimed that respondent defamed her by stating publicly, after the charges were dismissed, that he continued to believe she was responsible for the crime. Compl. ¶ 46. Since petitioner presented no evidence on that claim the district court granted respondent's motion for a directed verdict. Pet. App. 16a. Petitioner sought no further review of that claim.

[7] Respondent had also filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). The district court denied that motion, concluding that petitioner had alleged violations of federally protected constitutional rights and that she had raised claims that principles of absolute and qualified immunity did not necessarily bar. Order 7-9, *Burns* v. *Cox*, No. IP 85-155-C (S.D. Ind. Feb. 25, 1986).

In his motion for summary judgment, respondent argued in the alternative that he was entitled to qualified immunity. The district court denied that claim, concluding that respondent's failure to make known to the county court judge all the pertinent facts in the course of applying for the search warrant may have violated clearly established federal law. Order 6-8, 10, *Burns* v. *Cox*, No. IP 85-155-C (S.D. Ind. May 1, 1987).

[8] The court also denied the motions for summary judgment filed by Scroggins, Cox, and Stonebraker. As a result, those defendants settled with petitioner and agreed to pay her a total of $250,001. Pet. 2; Pet. App. 5a. The district court later dismissed petitioner's claims against all defendants except respondent. See Pet. 2.

proval of the officers' request to interview petitioner under hypnosis amounted to "giving legal advice." *Id.* at 15a. With respect to respondent's statement to the officers that they had probable cause to arrest petitioner, the court similarly found that this advice was his "legal opinion." *Id.* at 16a. Finally, with respect to respondent's participation in the judicial hearing, the court found that he "was doing his job as a deputy prosecuting attorney in presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-14a. It stated that, under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the scope of absolute immunity accorded to a prosecutor's conduct required consideration of three factors: (1) whether there is a historical or common law basis for the asserted immunity; (2) whether the official's actions subject him to the risk of vexatious litigation; and (3) whether there are safeguards against the official's abuse of his authority. Pet. App. 9a & n.4.

Turning to that analysis, the court admitted that its

> review of the historical or commonlaw [*sic*] basis for the immunity in question does not yield any direct support for the conclusion that a prosecutor's immunity from suit extends to the act of giving legal advice to police officers.

Pet. App. 11a. Borrowing from Indiana common law, however, the court determined that "the dispositive question is whether the conduct of the prosecutor is of a judicial nature and requires the prosecutor to exercise analogous judgment." *Id.* at 11a-12a. Here, the court found that when a prosecutor provides legal advice to police, he does "function[] in a manner similar to both [his] role as a prosecutor and to that of a judge." *Id.* at 12a.

With respect to the second factor—the risk of vexatious litigation—the court had "little doubt that a prosecutor's risk of becoming entangled in litigation based on his or

her role as a legal advisor to police officer[s] is as likely as the risks associated with initiating [a] prosecution." Pet. App. 12a. Finally, the court found that there were "sufficient checks upon the prosecutor to prevent abuses of the authority to render legal opinions free from liability." *Id.* at 13a. The court pointed to the judicial process itself, the electorate, and professional disciplinary rules. Accordingly, the court held that "a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct." *Ibid.*[9]

On the record presented, the court found it "apparent that [respondent] was rendering legal advice to the officers." Pet. App. 13a.[10] The court therefore held that he was entitled to absolute immunty from suit.[11]

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[9] The court made clear, however, that "a prosecutor steps outside of his * * * quasi-judicial role when he * * * actually participates in investigative conduct * * * [and that] such conduct is not accorded absolute immunity." Pet. App. 13a.

[10] The court, in a brief footnote, rejected petitioner's contention that respondent's "act of presenting evidence before the county judge in the probable cause hearings was part of the investigative stage of the case." Pet. App. 11a n.6. The court held that, under *Imbler* v. *Pachtman*, 424 U.S. at 431, respondent was absolutely immune from suit for such conduct taken "in initiating a prosecution and in presenting the state's case." Pet. App. 11a n.6.

[11] Judge Ripple filed a short concurring opinion, emphasizing that the court had held only that "a prosecutor enjoys absolute immunity with respect to *legal advice* given to law enforcement officers * * * [and did] not hold that such absolute immunity necessarily extends to situations in which the prosecutor goes beyond rendering legal advice and assumes responsibility for the management of the investigation." Pet. App. 14a.

SUMMARY OF ARGUMENT

A. The scope of absolute immunity for the performance of prosecutorial functions should be determined by the need to protect those functions that directly affect the fairness and integrity of the judicial process. As this Court recognized in *Imbler* v. *Pachtman*, harassment of a prosecutor by unfounded litigation could divert his energies, cause him to lose his independence of judgment, and thus have an adverse effect on the functioning of the criminal justice system. Even those prosecutorial activities that occur at the investigative stage, and that aid in the investigation, may require the protection of absolute immunity if they are "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. at 430.

In light of those principles, the inquiry in each case should be whether the threat of a damages action will unduly chill the exercise of the prosecutor's judgment and, if so, whether the fairness and integrity of the judicial process itself is also threatened. Also relevant to the inquiry are the insights afforded by consideration of practices and precedents at common law, and the existence of available alternatives to a damages remedy for the correction and deterrence of official misconduct. Under this framework, the activities challenged here warrant absolute immunity from suit.

B. When a prosecutor provides legal advice to police officers in connection with an investigation, the advice is integral to, and in furtherance of, his core functions of screening cases for formal presentment and of safeguarding the fairness of the criminal justice process. The fact that such advice occurs at the investigative stage is no more determinative of absolute immunity than the fact that, at that stage, a judge issues a search warrant or supervises a grand jury. The critical consideration is that the prosecutor's assessment of the legal consequences of police investigative conduct is directly related to his obligation to screen and develop cases for

trial. Similarly, this assessment of the existence of probable cause to arrest is integral to the decision to file formal charges and to the admissibility at trial of evidence seized in the course of the arrest. Moreover, the role of the prosecutor in furnishing such advice interposes a check on law enforcement activity and bolsters the fairness of the criminal justice process. The availability of damages actions for the giving of such advice would seriously threaten to divert the time and energy of the prosecutor, might discourage him from acting as a check on the activities of the police, and, most importantly, might substantially affect the exercise of his judgment in deciding whether to bring formal charges, and how to proceed once those charges have been brought.

Although there is no clear common law tradition with respect to the prosecutor's role in providing legal advice, that history should not be controlling. The office of professional public prosecutor was largely unknown at English common law, and in this country, the office was largely confined to the accusatory stages of the criminal process until relatively recent times. But the importance of the prosecutor's role in the investigative stage, and its close relation to his more traditional accusatory role, are now widely recognized.

Recognition of absolute immunity in the circumstances of this case is supported by the availability of alternative means of correction and deterrence. Those means include judicial review of police conduct in both civil and criminal proceedings, the exercise of judicial supervisory power to correct prosecutorial abuses, and the various avenues for subjecting prosecutors to professional discipline.

C. When a prosecutor elicits testimony during a probable cause hearing to obtain a search warrant, he is also entitled to absolute immunity from liability for damages. His participation in the obtaining of the warrant is an integral part of his responsibility to screen and prepare cases for later judicial proceedings, and his participation also furthers his role in safeguarding the criminal justice process. As with legal advice, the availability of

civil damages actions might deter prosecutors from performing this valuable function—a function that is clearly of importance to the court's understanding of the need for a warrant and the sufficiency of the application.

The basis for absolute immunity here is closely analogous to the common law immunity afforded to prosecutors from actions for malicious prosecution. And again, as in the realm of legal advice, there are significant alternative means of correcting and deterring prosecutorial abuse.

ARGUMENT

PROSECUTORS ARE ABSOLUTELY IMMUNE FROM SUIT FOR DAMAGES FOR GIVING LEGAL ADVICE TO POLICE OFFICERS ABOUT THE CONDUCT OF CRIMINAL INVESTIGATIONS AND FOR PARTICIPATING IN JUDICIAL PROCEEDINGS RELATED TO SUCH INVESTIGATIONS

A. Under This Court's Decisions, Absolute Immunity Shields The Performance Of Those Prosecutorial Functions That Directly Affect The Fairness And Integrity Of The Judicial Process

1. In *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [42 U.S.C.] 1983." In so holding, the Court concluded that such activities "were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430. Those reasons included the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust," *id.* at 423, the concern that such litigation "could have an adverse impact upon the functioning of the criminal justice system," *id.* at 426,

and the availability of other checks on prosecutorial misconduct short of civil damages actions, *id.* at 429.

As this Court has recognized, the prosecutor's institutional role includes a variety of responsibilities beyond the filing of criminal charges and presenting the State's case in the courtroom. In *Imbler* v. *Pachtman*, for example, the Court noted that the prosecutor's task may "cast him in the role of an administrator or investigative officer," 424 U.S. at 430-431, and even the purely advocatory functions of initiating and presenting a case may require preliminary "actions apart from the courtroom," *id.* at 431 n.33. In *Imbler*, however, the Court had no occasion to determine the issues presented here—whether and to what extent absolute immunity shields these prosecutorial functions.

In approaching these issues, we recognize the Court's unwillingness to give expansive scope to the concept of absolute immunity. See *Forrester* v. *White*, 484 U.S. 219, 224 (1988). As in other contexts, the scope of such absolute prosecutorial immunity must be "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227. Under such a functional approach to absolute immunity, it is admittedly difficult to draw any broad generalizations regarding which of the prosecutor's various official tasks warrant protection. Nonetheless, the Court's unwavering concern with protecting the exercise of those functions that directly affect the fairness, accuracy, and integrity of the judicial process provides the pertinent benchmark.

The Court has long held that judges may not be subjected to civil suit for the exercise of decisionmaking authority that colorably falls within their jurisdiction and is tied to their role in the judicial process. *E.g.*, *Forrester* v. *White*, *supra*; *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872). The Court has accorded trial witnesses similar protection, principally to insure that the integrity of the judicial process is not impaired by witnesses' fears that accurate and

complete testimony will expose them to damages actions. *E.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). Moreover, although the full scope of prosecutorial immunity is not settled, *Imbler* makes plain that—at a minimum—civil damages liability may not be based on the performance of those prosecutorial functions that are "intimately associated with the judicial phase of the criminal process" ~~may not ground civil damages liability~~. *Imbler* v. *Pachtman*, 424 U.S. at 430; see *Butz* v. *Economou*, 438 U.S. 478, 516-517 (1978).

2. This Court's functional approach and its overarching concern with preserving the integrity of the judicial process suggest the appropriate framework for determining the scope of absolute immunity in this case. That framework calls for the Court first to identify the particular prosecutorial functions implicated by the challenged conduct. The Court should then assess whether the specter of a damages action will unduly hamper the prosecutor's exercise of those functions and, if so, will ultimately impair the fairness and integrity of the judicial process itself. See, *e.g.*, *Westfall* v. *Erwin*, 484 U.S. 292, 295-296 & n.3 (1988); *Forrester* v. *White*, 484 U.S. at 223-224; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811-812 (1982); *Butz* v. *Economou*, 438 U.S. at 511-517; *Doe* v. *McMillan*, 412 U.S. 306, 319-320 (1973). The Court should next consider the historical materials—whether there were analogous practices and precedents at common law and whether those practices and precedents cast light on the protection to be afforded. Finally, the Court should consider the extent to which alternatives to a damages remedy can rectify and deter misuse of prosecutorial authority. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 521-522 (1985); *Briscoe* v. *LaHue*, 460 U.S. at 330-336; *Imbler* v. *Pachtman*, 424 U.S. at 421-429.

Under this framework, respondent's challenged prosecutorial activities warrant absolute immunity from suit for damages. Those activities—giving legal advice to police officers about the conduct of an investigation and later participating in a judicial proceeding to obtain a

search warrant—are integral to core prosecutorial functions, namely, screening cases for formal presentment of charges and later judicial proceedings and safeguarding the fairness of the criminal justice process. Exposing such conduct to the intimidation and harassment of civil litigation would thus undermine the judicial process itself—a result not at all compelled by relevant common-law principles. Finally, there are other means available—short of a civil damages remedy—to provide adequate legal redress for injuries arising from prosecutors' misconduct in discharging their responsibilities.

B. Giving Legal Advice To Police Officers About The Conduct Of An Investigation Is Integral To The Prosecutor's Functions Of Screening Cases For Formal Presentment Of Charges And Later Judicial Proceedings And Of Safeguarding The Fairness Of The Criminal Justice Process

1. Petitioner first seeks to hold the prosecutor liable for injuries arising out of his legal advice to the police officers during the course of their investigation, *i.e.*, his approval of the officers' request to question petitioner under hypnosis and his later advice to the officers that there was probable cause to arrest her.[12] In petitioner's view (Br. 17-22), such conduct on behalf of a prosecutor merely furthers a police investigation and thus falls outside the scope of absolute immunity recognized in *Imbler*.

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[12] Both the district court, Pet. App. 15a-17a, and the court of appeals, *id.* at 13a, expressly found that respondent's challenged conduct amounted to the giving of "legal advice." Petitioner has offered no persuasive reason to challenge that factual finding concurred in by both lower courts. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

In the district court, petitioner also sought relief for respondent's alleged role in securing a warrant for her arrest. See Compl. ¶ 34. The district court apparently rejected that claim at some point before it granted respondent's motion for a directed verdict. See Tr. 199, 205. Petitioner has not raised that claim before this Court.

At the outset, petitioner's labelling of conduct as "investigative" or "advocatory" is largely beside the point, since it ignores the particular activity's relation to the functions entrusted to the prosecutor and the significance of those functions in the criminal justice process. Cf. *Gray* v. *Bell*, 712 F.2d 490, 499 n.21 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (rejecting contention that prosecutorial immunity turns on whether conduct can be labelled advocatory, investigatory, or administrative). Certain activities in the course of an investigation may be crucial to the prosecutor's role in screening a case or preparing for trial. Indeed, as this Court has noted, "[p]reparation both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Imbler* v. *Pachtman*, 424 U.S. at 431 n.33. Accordingly, lower courts have recognized that the core prosecutorial functions protected by *Imbler*'s absolute immunity encompass "investigatory" activity that is needed to evaluate and prepare a criminal prosecution. See, *e.g.*, *Gobel* v. *Maricopa County*, 867 F.2d 1201, 1204 (9th Cir. 1989); *Cook* v. *Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981). Thus, the central question is not, as petitioner asserts, whether the activity can be characterized as "investigatory". Rather, the inquiry centers on whether the activity at issue furthers a prosecutorial function that must be shielded from vexatious damages actions in order to protect the fairness and integrity of the judicial process.

Petitioner's amici (ACLU Br. 15-17) similarly err in contending that when a prosecutor gives legal advice to the police in connection with a criminal investigation, the advice is not a "uniquely prosecutorial function" mandated by the judicial process but is instead more closely allied to law enforcement functions that have been afforded only qualified immunity. This Court has emphasized that absolute immunity must be determined by "the nature of the function performed, not the identity of

the actor who performed it * * *." *Forrester* v. *White*, 484 U.S. at 229. To be sure, if the various participants in the criminal justice system performed functions that were not only characteristic of their office but also mutually exclusive, a "uniquely prosecutorial" test might have some validity. But the functions assigned to those participants cannot be so neatly pigeonholed.

Judges, for example, perform several functions that are closely tied to criminal investigations. As the Court has explained:

> [F]ederal courts have traditionally supervised grand juries and assisted in their "investigative function" by, if necessary, compelling the testimony of witnesses. * * * Federal courts also participate in the issuance of search warrants, * * * and review applications for wiretaps, * * * both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding.

Morrison v. *Olson*, 487 U.S. 654, 681-682 n.20 (1988) (citations omitted). Such actions are essential to the judicial function and thus, despite their "investigatory" attributes, fall within the ambit of a judge's absolute immunity. For similar reasons, the fact that a prosecutor's actions may aid a criminal investigation cannot be determinative on the question of absolute immunity. To the contrary, the scope of prosecutorial immunity depends on the significance of the pertinent prosecutorial function as it implicates the need to protect the judicial process itself.

2. Turning to that inquiry, we believe that the prosecutor's legal advice to the police about the conduct of an investigation is integral to two core, interrelated prosecutorial functions—screening cases for formal presentment of charges and later judicial proceedings and safeguarding the fairness of the criminal justice process.

First, the prosecutor's assessment of the legal consequences of police investigative conduct is directly related to his obligation to screen and develop cases for trial. See, *e.g.*, 1 ABA Standards for Criminal Justice 3-3.4 &

pp. 3.46 to 3.47 (2d ed. 1980) (ABA Standards); National District Attorneys Ass'n, National Prosecution Standards 8.6 & pp. 126-128 (1977) (National Prosecution Standards). For example, the propriety of using hypnosis as a means of interrogating a suspect in a murder investigation would affect the admissibility of that person's statements (and fruits of those statements) in any criminal proceeding. See, *e.g.*, *Rowley* v. *State*, 483 N.E.2d 1078, 1081 (Ind. 1985); cf. *Rock* v. *Arkansas*, 483 U.S. 44, 56-62 (1987). And in this case, given the apparent lack of incriminating evidence other than petitioner's statements under hypnosis, it is evident that the legal consequences of that interrogation bore directly on the strength of the State's case and would have been taken into account in the decision to file formal charges. See, *e.g.*, 1 ABA Standards 3-3.6 & 3-3.7 & pp. 3.49 to 3.52; National Prosecution Standards 9.4.

Similarly, the prosecutor's assessment of whether the police had probable cause to make a warrantless arrest bears on his view of the strength of the state's case against a suspect. Absent probable cause, the arrest would be invalidated, any evidence seized incident to the arrest could be rendered inadmissible, and the basis for lodging formal charges against the suspect would be undermined. Viewed from this perspective, the prosecutor's assessment here of whether the police had probable cause to arrest petitioner would likely be an integral part of his formal charging decision.[13] Indeed, as lower courts have recognized, "[t]he initial determination of whether such probable cause exists is part of the larger process of determining whether to initiate a prosecution." *Marx* v. *Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988); accord

[13] Under Indiana law, the police must promptly bring an individual arrested without a warrant before a judicial officer for a probable cause determination that a crime was committed. See Ind. Code Ann. § 35-33-7-2 (Burns 1985). The authorities may not seek an arrest warrant unless the suspect has first been formally charged with a crime. See Ind. Code Ann. § 35-33-2-1(c) (Burns 1985).

Myers v. *Morris*, 810 F.2d 1437, 1448 (8th Cir.), cert. denied, 484 U.S. 828 (1987); but cf. *Wolfenbarger* v. *Williams*, 826 F.2d 930, 937 (10th Cir. 1987) (prosecutor's advisory function entitled only to qualified immunity).

Second, the provision of legal advice about the propriety of police conduct furthers the prosecutor's institutional responsibility to safeguard the fairness of the criminal judicial process. This Court has emphasized that the prosecutor's institutional role extends beyond his obligation to serve as an advocate for the state:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. *United States*, 295 U.S. 78, 88 (1935); accord *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802-804 (1987).

Under that well-recognized obligation, the prosecutor has the responsibility to "provide legal advice to the police concerning police functions and duties in criminal matters." ABA Standards 3-2.7(a); accord ABA Model Code of Professional Responsibility EC 7-13 (1989).[14] Thus, when a prosecutor advises police officers about the legal ramifications of their conduct he truly acts in a "quasi-judicial" capacity, not simply because he renders a legal opinion, but because the exercise of the prosecu-

[14] See also Indiana Rules of Professional Conduct 3.8, comment (1990) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

tor's judgment in rendering that opinion interposes a check on law enforcement activity and bolsters the fairness of the criminal justice process.

3. The prosecutorial functions implicated by a prosecutor's legal advice—screening cases for formal presentment of charges and later judicial proceedings and safeguarding the fairness of the criminal justice process—warrant the protection of absolute immunity. Since the provision of legal advice furthers the prosecutor's ability to screen and develop cases, such conduct should be accorded absolute immunity for the same reasons as those articulated in *Imbler*: a prosecutor must be free to exercise his discretion to initiate a criminal proceeding without fear that an error will embroil him in civil dsputes and expose him to personal liability, thereby "caus[ing] a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. at 423.

Similarly, insofar as the prosecutor's legal advice furthers the "quasi-judicial" function of safeguarding the fairness of the criminal justice process, a prosecutor should not be subject to the risk that the mere expression of an opinion as to the legality of a police action will expose him to damages suits. As the court of appeals pointed out, any other result will discourage the prosecutor from providing such advice, thereby removing an important and salutary check on police conduct of an investigation:

> [I]t is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutors from fulfilling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques, and the possibility that their proposed conduct will violate the rights of their suspects.

Pet. App. 12a-13a.[15]

The prosecutorial functions implicated by giving legal advice need the shield of absolute immunity precisely because qualified or conditional immunity will not adequately insure that the prosecutor can perform these functions without becoming entangled in damages actions. To be sure, such reduced protection would still preclude liability if the prosecutor's conduct does not violate clearly established federal law. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. at 815-819. That potential liability, however, is only one aspect of the problem. Protection is also needed to offset the substantial risk of committing the prosecutor's time and resources to defending against damages actions, and to reduce the chilling effect of potential lawsuits. By its terms, qualified immunity—an affirmative defense—does not insulate prosecutors from the risk of vexatious litigation. See *Anderson* v. *Creighton*, 483 U.S. 635, 646-647 n.6 (1987).

Indeed, in *Imbler* this Court accorded the protection of absolute immunity to certain prosecutorial functions because any lesser protection would still force the prosecutor to answer in court every time a disgruntled individual alleged official misconduct. *Imbler* v. *Pachtman*, 424 U.S. at 424.[16] That reasoning obtains here. The prosecu-

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[15] There will be instances in which a prosecutor not only expresses a legal opinion on the ramifications of police conduct but also controls or actively participates in a law enforcement investigation. See, *e.g.*, *Robinson* v. *Via*, 821 F.2d 913, 918-919 (2d Cir. 1987) (participating in raid during preliminary investigation); *Rex* v. *Teeples*, 753 F.2d 840, 843-844 (10th Cir. 1985) (interviewing suspect during investigation). The question whether and to what extent absolute immunity shields those sorts of prosecutorial activities is not presented here since respondent's role was entirely advisory. See note 12, *supra*.

[16] We recognize, as did the court of appeals (Pet. App. 8a n.3), that the functional analysis underlying a claim of absolute immunity may itself require resolution of certain factual matters

torial functions implicated in this case—screening cases for formal presentment of charges and trial and safeguarding the fairness of the criminal justice process—are no less important than those addressed by *Imbler*.

Moreover, the absolute immunity recognized in *Imbler* would itself be eroded if litigants, through artful pleading, could freely assert claims based on prosecutorial conduct warranting only qualified immunity. As a practical matter, decisions regarding presentation of the case or the initiation of a prosecution—the core functions entitled to absolute immunity under *Imbler*—can often be linked to some series of actions preceding the filing of formal charges. If preliminary actions—such as assessing probable cause to arrest or evaluating the admissibility of evidence—are accorded less than full protection, the absolute immunity recognized in *Imbler* will inevitably be diminished, and the risk that prosecutors will be subjected to vexatious claims for damages will be substantially increased.

4. Contrary to the suggestion of petitioner's amici (ACLU Br. 7-8), the absence of any clear common law tradition of absolute immunity in the circumstances of this case does not foreclose the result reached by the courts below. Although that tradition has informed the Court's decisions, the Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson* v. *Creighton*, 483 U.S. at 645.

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and thus expose prosecutors to some degree of entanglement in damages actions. Nonetheless, even if the protection afforded by absolute immunity is not complete, it is a far more effective means of insuring that many—if not all—damages actions against prosecutors will present pure questions of law that, contrary to petitioner's view (Br. 25), the court can resolve on the pleadings. Cf. *Haynesworth* v. *Miller*, 820 F.2d 1245, 1266 n.161 (D.C. Cir. 1987) (noting that claim of absolute immunity can be resolved on pleadings where complaint fairly discloses the character of the challenged official conduct).

In the first place, the office of professional public prosecutor was largely unknown at English common law. See Kress, *Progress and Prosecution*, 423 Annals 99, 100-101 (1976); Langbein, *The Origins of Public Prosecution at Common Law*, 17 Am. J. Legal Hist. 313 (1973). That office, which developed in this country during the eighteenth and nineteenth centuries, initially confined its jurisdiction to the formal accusatory—as opposed to investigatory—stages of the criminal process, *i.e.*, filing formal criminal charges, dismissing charges initiated by the police, and presenting the state's case in court. See J. Jacoby, *The American Prosecutor: A Search For Identity* 11-19 (1980); McDonald, *The Prosecutor's Domain*, in *The Prosecutor* 15, 23-28 (W. McDonald ed. 1979). Indeed, such prosecutorial control as the provision of legal advice to police about pending investigations is principally a twentieth-century phenomenon. See J. Jacoby, *supra*, at 107-110; McDonald, *supra*, at 32-38. Thus, the prosecutor's conduct at issue here—advising the police about the consequences of an investigative technique or the legal bases for an arrest—cannot be fairly compared to functions performed by prosecutors in times past.

As this Court suggested in *Anderson* v. *Creighton*, the absence of a comparable common law analogue should not preclude extension of absolute immunity to modern prosecutorial functions. Rather, the scope of immunity should turn on the substantial public interest in vigorous exercise of those current day functions that directly affect the integrity of the judicial process. Here, immunity from damages liability for the prosecutor's giving legal advice to police officers facilitates the exercise of the prosecutor's discretionary function to initiate and conduct judicial proceedings—a function that in turn serves the weighty public interest in promoting the fairness and efficacy of criminal justice.[17]

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[17] Indeed, the integral relation between the actions complained of here and the more traditional functions of the public prosecutor

5. Finally, according absolute immunity in the circumstances of this case is warranted because of other available checks on prosecutorial misconduct. First, police conduct itself is amenable to judicial review in both civil and criminal proceedings. For example, warrantless arrests are subject to prompt judicial hearings for probable cause determinations. See, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103 (1975); see Ind. Code Ann. § 35-33-7-1 and 2 (Burns 1985). Similarly, as shown by petitioner's defense of the state criminal charges, material statements obtained through improper invesitgative techniques are subject to judicial review. See, *e.g.*, Ind. R. Crim. P. 3; Fed. R. Crim. P. 12(b).

Second, a court may exercise its supervisory power to correct misuses of prosecutorial authority that result in fundamental and pervasive prejudicial errors in the judicial process. See, *e.g.*, *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 809-810; *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). Third, as this Court recognized in *Imbler*, 424 U.S. at 429, prosecutors remain subject to professional discipline and may be held accountable for engaging in conduct that violate standards of professional ethics. See, *e.g.*, ABA Code of Professional Responsibility DR 7-103(A) (1989).[18]

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strongly suggests that common law immunity would have been afforded to such actions for the same reasons that immunity was afforded from actions for malicious prosecution. See pp. 25-26, *infra*. The case, in other words, is very different from one in which courts at common law declined to recognize claims of absolute immunity for the same kinds of prosecutorial conduct that are the subject of a present day damages action.

[18] Under regulations promulgated by the Attorney General, federal prosecutors guide their conduct by the ABA Code of Professional Responsibility. See 28 C.F.R. 45.735-1(b). The Office of Professional Responsibility of the Department of Justice investigates allegations of professional misconduct by federal prosecutors. Violations of applicable ethical standards subject prosecutors to disciplinary sanctions. See 28 C.F.R. 45.735-1(c).

We acknowledge that such remedies may not afford complete redress in every case of prosecutorial misconduct. But the substantial public interest in protecting the integrity of the criminal justice process outweighs any shortcomings in the panoply of remedies. Indeed, this Court has recognized that

> [a]s public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.

Ferri v. *Ackerman*, 444 U.S. 193, 202-203 (1979).

C. Eliciting Testimony During A Probable Cause Hearing To Obtain A Search Warrant Is Also Integrally Related To the Prosecutor's Essential Functions

Under the framework and analysis set forth above, the prosecutor's participation in a judicial hearing to obtain a search warrant—conduct intimately connected with the judicial process itself—also merits absolute immunity from suit for damages.

1. First, the prosecutor's participation in obtaining a search warrant is an integral part of his responsibility to screen and prepare cases for later judicial proceedings. In setting forth the standards regarding the prosecutor's "[d]ecision to charge," leading authorities state that "[a]bsent exceptional circumstances, no arrest warrant or search warrant should issue without the approval of the prosecutor." ABA Standards 3-3.4(b); accord National Prosecution Standards 7.3. The federal government has an established practice of requiring prosecutors to review applications for search warrants. See 28 C.F.R. 59.4(b) and 60.1. And today, many state and local juris-

dictions follow similar procedures. See R. Van Duizend, L. Sutton, & C. Carter, *The Search Warrant Process* 20-21 (1985); ABA Standards 3-3.4(c), pp. 3.45 to 3.46. That screening function is necessarily one component of the prosecutor's ultimate charging function. By reviewing the warrant application, the prosecutor can insure that the application is sound and thus can minimize the risk of suppression of evidence critical to the state's case. Cf. *Malley* v. *Briggs*, 475 U.S. 335, 345-346 (1986).

Second, the prosecutor's participation in the probable cause hearing—aiding the court to determine the existence of probable cause—furthers his role in safeguarding the criminal justice process.[19] That participation not only clarifies for the court the bases of the warrant application, but also enables the court directly to pose questions to the prosecutor as an aid to understanding the need for and sufficiency of the application. In these circumstances, the prosecutor's participation, when properly discharged, helps assure the fairness of the warrant proceeding and ultimately of the criminal justice process as a whole.[20]

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[19] Ordinarily, applications for search warrants are submitted with written affidavits. See, *e.g.*, Fed. R. Crim. P. 41(c)(1); Ind. Code Ann. § 35-33-5-2(a) (Burns 1985). State and federal criminal procedure, however, provide that courts may issue search warrants on the basis of sworn testimony elicited at a hearing. See, *e.g.*, Fed. R. Crim. P. 41(c)(2); Ind. Code Ann. § 35-33-5-2(c) (Burns 1985).

[20] Petitioner (Br. 22-23) and her amici (ACLU Br. 18-19) maintain that respondent, in eliciting testimony at the search warrant hearing, performed an "investigatory" function. The record belies that characterization. Respondent played no role in the management or conduct of the police officers' investigation, including their decision to search petitioner's house. See Tr. 44, 134-135. As respondent explained, "I was told [the police officers] wanted a search warrant. I went to court to ask the officers what it was they based their request on." Tr. 145.

For that reason, petitioner's amici (ACLU Br. 19-20) err in relying on *Malley* v. *Briggs*, 475 U.S. 335 (1986). There, the police officer who testified at the probable cause hearing was directing the criminal investigation and made the decision to procure the warrant. *Id.* at 338-339. Here, by contrast, respondent's role was limited to eliciting testimony to enable the court to make the probable cause determination. And application of absolute immunity is not foreclosed by the fact that a prosecutor, who participates in a judicial proceeding to aid the police in obtaining a search warrant, may be seen as performing a police or investigatory function. A judge who issues a search warrant also facilitates a police investigation, but he is nonetheless entitled to absolute immunity—even if it should have been obvious that the application was inadequate. See *Pierson* v. *Ray*, 386 U.S. 547 (1967). The pertinent inquiry is not whether the challenged action relates to (or furthers) a police investigation. Rather, the inquiry is whether that action furthers an institutional function that directly affects the fairness and integrity of the judicial process. Viewed from this perspective, the prosecutor's efforts to assist the court in a probable cause hearing fall within that category of functions meriting immunity.

2. For the reasons detailed above, see pp. 18-23, *supra*, the prosecutorial function of participating in the search warrant hearing warrants the protection of absolute immunity.

First, absent such protection, the prosecutor could be exposed to repeated claims for damages arising out of his review of search warrant applications or participation in search warrant proceedings. That could in turn chill a prosecutor's willingness vigorously to support mertiorious warrant applications.

Second, had the prosecutor's screening function existed before modern times, we believe that common law would have recognized an immunity from suit with respect to his participation in warrant proceedings. Although the common law did not provide immunity to the complaining witness at a warrant hearing, see *Malley* v. *Briggs*, 475 U.S. at 340-341 & n.3, the prosecutor who elicits testimony at such a hearing is not acting as a witness. Rather, at that point, the prosecutor is actually furthering the state's criminal prosecution of the target of the search. The analogous common law tort embracing such conduct is malicious prosecution. See, *e.g.*, *Hardin* v. *Hight*, 106 Ark. 190, 197, 153 S.W. 99, 101 (1913) (pro-

curing search warrant may ground action for malicious prosecution): *Harlan* v. *Jones*, 16 Ind. App. 398, 45 N.E. 481 (1896) (same). And, as *Imbler* makes clear, prosecutors were generally held immune from claims of malicious prosecution at common law. *Imbler* v. *Pachtman*, 424 U.S. at 421-423.

Third, prosecutorial misconduct at search warrant hearings can be adequately remedied through means other than a damages remedy. Errors at that early stage of the criminal process can be quickly exposed to judicial scrutiny, even before the institution of criminal charges, by a motion for the return of property seized. See, *e.g.*, Ind. Code Ann. §§ 35-33-5-5(b) and 35-43-4-4(h) (Burns 1985 & Supp. 1990); Fed. R. Crim. P. 41(e). Moreover, after charges are lodged, prosecutorial improprieties may be effectively remedied on pretrial motions seeking to dismiss those charges or on motions to suppress evidence seized as a result of the search. Lastly, the various disciplinary mechanisms in place for policing prosecutorial misconduct are available to rectify and deter such misuse of official authority.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

BARBARA L. HERWIG
JEFFREY A. CLAIR
Attorneys

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